

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1373

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

-against-

SALVATORE MOGAVERO,

Appellant.

*On Appeal From the United States District
Court for the Eastern District of New York*

APPELLANT'S BRIEF

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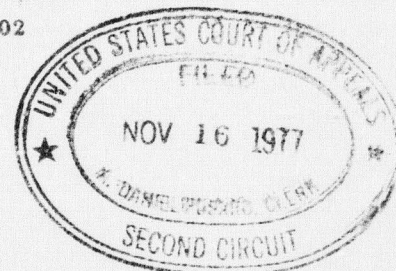


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PRELIMINARY STATEMENT

This is an appeal on behalf of the above-named appellant, Salvatore Mogavero, from a Judgment of Conviction in the United States District Court, Eastern District of New York, Hon. Jacob Mishler, U.S.D.J., and a jury convicting the appellant of violation of Title

21 U.S.C. §846; and a violation of Title 21 U.S.C. §841
(a)(1).

That thereafter, the appellant was sentenced by
the Hon. Jacob Mishler, on August 19, 1977 to a term
of two years imprisonment and a special parole term
of three years on each count; said counts to run con-
currently.

STATEMENT OF FACTS

Special Agent Paul Sennett testified for the Government as follows: (10)*

That he met with one Irwin Bell who said that he knew an individual in Queens by the name of Freddie that had 5000 Qualudes for sale (14). After a phone call, the agent went to a White Castle parking lot in Queens and met two individuals. An appointment was made for one Freddie Moskowitz to call the agent the next day. This was done and Moskowitz told the agent he had 1000 Qualudes for sale at a price of \$2,000.00 (15). The pills were received in evidence as Government's Ex. 1 (18). They then met at the parking lot and the sale was consummated. Thereafter, on September 15, 1976, Moskowitz again called the agent and told him that he had 2500 tablets for sale at \$1.90 a pill. Again the agent went to the White Castle parking lot and met Moskowitz (18-19). Moskowitz told the agent that the pills were in a girl's apartment, the Versailles, on 209th Street in Queens. They drove to the Versailles, Moskowitz went upstairs and came down with only 1000 pills (19). The agent was advised there would be 1500 the next day and later in the week an additional 10,000 were coming from Brooklyn (20). The sale for the 1000

pills was then consummated (20). The pills were received into evidence as Government's Ex. 2 (20).

On November 4, 1976, Moskowitz again called the agent and said that he had 50,000 pills available. Arrangements were made to go to the Bayside Bowling Lanes in Queens, for delivery. At that time the agent heard Moskowitz talk to an individual named Peter (23). The agent then called another agent, Mike Torre, and told him to bring \$75,000.00 to the lot (23). The \$75,000.00 was a "flash roll". That at the time Moskowitz told the agents that they would have to go to Brooklyn to consummate the deal. They went to a Carvel Ice Cream store on Kings Highway (24). At around 5:40 p.m. an individual drove up in a 1973 White Cadillac and was introduced to the agent as Peter D'Agostino (25). D'Agostino told the agent that the pills were only a few minutes away and for him to get the money. Agent Sennett said, "I'm not going to get the money until I see the merchandise" (25). At about 6:10 p.m. a red Plymouth pulled into the parking lot and D'Agostino told him, "the pills are here". Agent Sennett, Moskowitz and D'Agostino started walking to the back of the car and Moskowitz said, "Yes, that's Sal, that's the guy with the pills. That's the guy that makes them" (25). D'Agostino got into the car, sat for a minute or two and both got out. The driver of the car stood next

to Agent Sennett and opened up the trunk of the car (26). Agent Sennett looked into the trunk and saw a couple of knotted plastic trash bags. He tried to unknot them to see the contents. At that time the driver of the car slammed the trunk down, got back into the car and drove out of the Carvel parking lot at a fast rate of speed (26). The witness testified that the individual was Salvatore Mogavero, the appellant herein (28). That he had observed the appellant for 35 to 40 seconds.

Over Counsel's objection, the agent testified that Freddie Moskowitz and Peter D'Agostino said to him, "Why did you want to look at the pills for? They were in the car" (28). Counsel then objected again under Rules 801, 803 and 804 of the Federal Rules of Criminal Procedure (30). The objection was overruled. The agent was then allowed to testify that Moskowitz and D'Agostino told him that Sal did not like to do the deal in this way and that he did not want to bring this many pills out on the street (33). Agent Sennett then told D'Agostino to try to smooth the thing over so that the deal could be worked out later that evening (33).

D'Agostino left and returned shortly thereafter with an unidentified female and told the agent that he would try to convince Sal to bring the pills back on the

street.

D'Agostino offered to transact the deal using \$6,000.00 of his own money, that the agent would repay, and then D'Agostino would reuse the money until the entire amount of 50,000 pills were purchased (34). Thereafter, about 9 p.m. D'Agostino and Moskowitz told the agent that the deal would not be consummated that evening (35).

The agent then testified as to a conversation by phone with Moskowitz on January 12, in which Moskowitz had approximately 25,000 pills for sale, but nothing could be done until D'Agostino came back from vacation. No mention of Mogavero was ever made in this conversation (36).

On January 27 Moskowitz called the agent and again said that he would consummate the purchase when D'Agostino returned from skiing (36-37).

On February 2, the agent met Moskowitz at the Bay-side Shopping Terrace and was offered 25,000 pills. Moskowitz told the agent that the pills were where D'Agostino's girlfriend lived (37). The agent then walked with Moskowitz to the Versailles apartment. Moskowitz pressed the hallway intercom to apartment 11R and talked to Peter D'Agostino. D'Agostino came down and told

him he had only 20,000 pills and the agent agreed to take them (38). D'Agostino went back up to the apartment and came down carrying a tan satchel and said, "There's 10,000 in here" (38-39). The officer examined the satchel and told D'Agostino that he would be right back with the money (39). The agent walked back to the car and advised his surveillance people of what was to take place. A few minutes later Moskowitz came around the side of the apartment carrying a satchel. Moskowitz was then placed under arrest (40). The satchel was received in evidence as Government's Ex. 3, over counsel's objection (40-41).

Cross-examination of Agent Sennett was as follows:

That the agent never saw Moskowitz talking to Mogavero (46). That neither Moskowitz nor D'Agostino ever went over to the car (51-52). That the agent was never at any time able to see whether, in fact, there were any pills in the bags that were in the trunk of Mogavero's car (53). The agent described Mogavero as about 5'7", 175 lbs., dark hair with a full beard, wearing a reddish sweatshirt and work pants. After being shown his report on November 8, 1976, it was shown that there is no mention of a beard by the agent (55). It was also shown that the agent stated in his report that the subject (Mogavero) weighed 190 lbs.

The next time the agent saw Mogavero was when he was arrested in February. The agent saw him in the booking room, a room that contained no one else but Mogavero and other agents (59-60). Mogavero had no beard at that time (60).

The Government then called Agent Michael A. Torre as a witness, who testified as follows:

Agent Torre generally confirmed the prior testimony of Agent Sennett as to the original meeting between Moskowitz and Sennett in Queens. Thereafter, Agent Torre testified that he met with D'Agostino at the Carvel Ice Cream store in Brooklyn, and at that time Moskowitz said to Agent Torre, in the presence of D'Agostino, "Your man blew the deal" (69). Moskowitz said that "The pills were in the trunk of the car, and your man (Sennett) wanted to play with them and my man got scared and took off" (69-70). Objection to this testimony was again overruled (70).

Agent Torre expressed his dissatisfaction to Moskowitz and D'Agostino as to the way the deal was being handled. Moskowitz told him that, "You can trust us because Sal is Peter's cousin" (70). Being unable to agree on a way to consummate the deal the agent cancelled the deal with Moskowitz and D'Agostino (71).

Robert Baker, a Special Agent, was called as the next

witness for the Government and testified as follows:

He observed a red car, bearing license No. 375 XVJ, parked in the Carvel parking lot in Brooklyn. He then saw Agent Sennett and others in the vicinity in the trunk of the red car which was up (76). He left the scene and then maintained surveillance on the red car which left the parking lot. The car was followed to the vicinity of 1711 Dahill Road, where it was parked. The driver then left the car and went into a candy store to make a phone call. The agent described the individual as a short, stocky fellow, with a beard. The agent then identified the appellant Mogavero as that individual (78). It was stipulated that the red vehicle with the aforementioned license plate was registered to Franca Mogavero, 1711 Dahill Road, Brooklyn, New York.

The next witness for the Government was Special Agent Ronald Catanese, who testified as follows:

That on November 4, 1976, he was in the vicinity of the Carvel Ice Cream store in Brooklyn (95). That he had no opportunity to observe the face of the man in the red sweatshirt (97). Agent Catanese further testified that on February 2, 1976 he walked up to an apartment complex called the Versailles. That at that place he saw Moskowitz and Agent Sennett. Eventually, Moskowitz was arrested and Agent Catanese thereafter drove to the front of the building

(99). That he then saw an individual who walked by whose "hair was cut nice" (100). This was about 4 o'clock in the afternoon. Thereafter, at 9 o'clock in the evening, back in the agent's office, he walked into a room and saw the individual who had walked by earlier that evening. The individual was pointed out to the agent as Salvatore Mogavero (101).

The Government then rested (117). A motion under Rule 29 for Judgment of Acquittal was denied as to both counts of the Indictment (118).

The defendant, Salvatore Mogavero, took the stand on his own behalf, and testified as follows:

That he was 38 years of age, married, had three children, and lives 1711 Dahill Road (119). That he was never convicted of a crime (119). That he was employed by Crossbay Excavators for the last 10 years. The defendant testified that he did not have a beard in November of 1976 (122). That on the night of November 4, 1976, he did not meet Peter D'Agostino nor Freddie Moskowitz. That he was not at a Carvel Ice Cream parlor on November 4, 1976 (122). The witness testified that he was not related to Peter D'Agostino (123).

The witness then testified that he went to a barber shop on February 2, 1977 and received a haircut. That Peter D'Agostino picked him up on that day and dropped him

off at the barber shop (124-125).

Cross-examination of Mogavero was as follows:

That the name of the barber shop was Paul's Hair-styles or Paul's Barbershop (127). That the barber who cut his hair was named Guy or Guido (127). The witness testified that quitting time at his job is 4:30 p.m. The witness did not remember whether he was home on November 4, 1976 or not (130).

The defense called one Richard Pachuta as a character witness for the appellant (141-143).

The defense then called Franca Mogavero as a witness for the defense who testified as follows:

That she is the wife of Salvatore Mogavero. That on November 4, 1976, her husband had no beard. That he did not own a red sweatshirt in November, 1976.

That in February of 1977 the appellant left with Peter D'Agostino to take a haircut (146).

Cross-examination of Franca Mogavero was as follows:

That the witness recalls her husband coming home between 5:30 and 6 p.m. on November 4, 1976 (152). That other people frequently borrowed her husband's car.

The defense then called James McPadden as a witness for the defense, who testified as follows:

That he was the construction supervisor for Cross-bay Excavators, the employer of the appellant (155).

That Mr. Mogavero was working on a construction job in Rahway, New Jersey in November of 1976 (155). That on numerous occasions, the appellant lent his car to other employees of Crossbay Excavators (155-156).

That the books and records (produced in Court) indicated that the appellant was working in Rahway, New Jersey on November 4, 1976 (157). That the appellant did not have a beard on November 4, 1976 (159). That he did have a beard in March and April of that Year (160).

One John Ronzino was called as a witness, and testified as follows:

That he went hunting with the appellant somewhere between October 15 and October 31 and at that time the appellant had no beard (170).

Guy Ferro was called as a witness by the defense and testified as follows:

That he is employed as a barber (175). That his place of employment is 50-08 Clearview Expressway, Bay-side. That he was introduced to the appellant by an individual named Peter. That he has cut the appellant's hair three or four times.

The witness recalled that the appellant got a haircut in his place of business, and that the next day he read of appellant's arrest in the newspaper (176).

The witness also remembers shaving the appellant's beard sometime last year (1976).

Cross-examination of the witness was as follows:

The witness recalled shaving the appellant's beard in the summer of 1976 (either June or July) (177).

The defense then rested (179).

POINT I

- a) THE GOVERNMENT HAS FAILED TO PROVE THE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT AS TO THE CONSPIRACY COUNT (TITLE 21 U.S.C. §846) AND AS TO THE POSSESSION COUNT (TITLE 21 U.S.C. § 841 (a)(1));
 - b) THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING HEARSAY DECLARATIONS INTO EVIDENCE MADE BY ALLEGED CO-CONSPIRATORS TO THE AGENTS OUT OF THE PRESENCE OF THE APPELLANT.
-

As To the Possession Count:

It is clear from the record that none of the testifying agents, nor any of the alleged co-conspirators, ever saw the appellant in possession of the pills which were the subject of count 4 of the within Indictment.

The Government attempted to prove that there were pills in the possession of the appellant on November 4, 1976, by showing the following:

1. Statements made to the agents by Moskowitz and D'Agostino subsequent and prior to the arrival of the appellant at a parking lot on November 4, 1976.

2. The opening of a car trunk by the appellant revealing two plastic bags therein.

3. The slamming of the car trunk by the appellant when the agent attempted to examine same and the appellant's rapid driving away from the scene.

It is respectfully submitted that even taken together, none of the above events would establish the appellant's guilt beyond a reasonable doubt. Of course, appellant submits that the evidence of the conversations between D'Agostino and Moskowitz with the agents prior and subsequent to his arrival at the Carvel parking lot were erroneously admitted into evidence by the Court.

This Court has held in U.S. v. Fantuzzi, 463 F.2d 683, (2d Cir. 1972), as follows:

"We find that the Government failed to establish the necessary connection and, as a result, Jose's testimony was testimony of prejudicial hearsay, was improperly admitted, and should not have been considered probative. We are unable to find solid ground upon which the statement could have been admitted, nor was one given in the court below. Nevertheless, it is clear that the district court placed reliance upon Jose's testimony in its decision to deny the defense motion made at the close of all the evidence

to acquit. Insofar as there could be any possible grounds for its admission, its admission would be that of an 'adoptive admission,' that is, a statement of a third party against the interest of the defendant, to which the defendant has assented, or which he has adopted by word or deed as his own. See Rule 8-01(c) (3)ii of the Proposed Rules of Evidence for the United States District Courts; Uniform Rules of Evidence, Rule 63 (8) (b); 4 Wigmore, Evidence, §1071 (3d ed. 1940). There is no evidence here, however, that Bruno either adopted or assented to Lucho's statement. There is a crucially fundamental difference between the admissibility of the third party's statement in this case and the adoptive admission discussed in United States v. Geaney, supra 417 F.2d at 1120. In Geaney, the third party's statement was made while the defendant was in front of the witness who testified to it, and the witness was able visually to observe the defendant's reaction to it. In this case the witness Jose Landaetta was not able to observe Bruno's reaction to Lucho's statement for, according to his testimony, he was sitting in the living room listening to music or watching television while Bruno and Lucho were talking in the kitchen. Not only was Jose unable to observe Lucho and Bruno but he did not hear any response made by Bruno to the Lucho comment. Under these circumstances, the Government has failed to prove that Bruno adopted the statement either through word, silence, or deed, and thus, Jose's testimony of overhearing Lucho's statement must be treated as any other nonprobative hearsay declaration." Id. at page 690.

In the case at bar, the appellant was not even present at the time that any of the statements were made by Moskowitz and D'Agostino to the agents. All of the within statements

were objected to by trial counsel. Without these statements of D'Agostino and Moskowitz, the case is left with the appellant's presence at the Carvel parking lot and his rapid removal therefrom after the agent attempted to open the bags in the trunk of the car. U.S. v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974), held as follows:

"In Williams, the government conceded that mere presence is insufficient to prove possession, but contended that presence plus flight made out a case. In dealing with this question, we cited Vick v. United States, 5 Cir., 1954, 216 F.2d 228, and McFarland v. United States, 5 Cir., 1960, 273 F.2d 417. In Vick, we held that presence plus flight is insufficient evidence to warrant conviction because the jury cannot reasonably conclude that such evidence excludes every reasonable hypothesis save that of guilt, at least where, as here, there are explanations of presence and motives for flight that are consistent with innocence. In McFarland, there was evidence over and above presence and flight, and we upheld the conviction. See also, Hill v. United States, 5 Cir., 1968, 395 F.2d 694; Pinion v. United States, 5 Cir., 1968, 397 F.2d 27. (emphasis supplied) Id. at page 115.

In United States v. Suarez, 487 F.2d 236 (5th Cir., 1973), the Court of Appeals held as follows as to one of the appellants Chiong:

"Chiong has been convicted of the possession of heroin with the intent to distribute it. He has also been convicted of its actual distribution.

Yet not a single eyewitness in this voluminous record ever saw any heroin in his possession, nor did they see him distribute any." Id. at p. 240.

The Court further stated that:

"Upon a careful reading of this record we are left with an abiding conviction that the government's evidence failed to eliminate all reasonable doubt that Chiong's paper bag contained heroin. Chiong may be guilty, but that is not the standard. The evidence must have been sufficient to support a jury belief beyond a reasonable doubt that he was, in fact, guilty.

Chiong has been sentenced to imprisonment for five years, a not unreasonable sentence if he were guilty. On the record now before us we must in good conscience say that the government did not carry the burden which was a prerequisite to such serious consequences." Id. at p. 240.

It is interesting to note that in all of the cases above cited, narcotics were found somewhere where the appellant was or had been, on the date of the occurrence. In the case at bar no narcotics were ever found on the date and place of occurrence.

The Government attempts to show possession of the narcotics in the appellant by his actions on the scene at the Carvol parking lot on November 4, 1976. This thesis was struck down by this Court in United States v. Jones, 308 F.2d (2d Cir., 1962). In discussing "aiding and abetting" the Court held as follows:

"18 U.S.C. § 2 is the governing statutory provision. It defines a principal for purposes of the federal criminal code, and its effect is to erase whatever distinctions may have previously existed between different classes of principals and between principals and aiders or abettors. The section does not create new substantive offenses. It merely states who the actors are that are punishable as violators of federal penal statutes. In short, if a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different from that necessary to convict the violator, except that aiding, abetting, commanding, inducing, or procuring the commission of the crime must be proven rather than actual commission. It has been held, therefore, that a defendant charged in an indictment as one who violated a penal statute may be convicted of having done so on proof that he aided and abetted an actual violator. E.g., *United States v. Shaffer*, 291 F.2d 689, 693 (7 Cir.), cert. denied, 368 U.S. 914, 915, 82 S. Ct. 192, 7 L.Ed.2d 130 (1961), cert. denied, 368 U.S. 999, 82 S.Ct. 627, 7 L.Ed.2d 537 (1962). Cf. *U.S. v. Rappy*, 157 F.2d 964 (2 Cir., 1946), cert. denied, 329 U.S. 806, 67 S.Ct. 501, 91 L.Ed. 688 (1947). In light of this, we cannot hold that if one element of knowledge must be established to convict a principal that knowledge need not be proven to convict an aider and abettor." Id. at p. 31-32.

It is respectfully submitted that in light of the foregoing, the Government has failed to prove the appellant's guilt of possession of narcotics beyond a reasonable doubt.

As To the Conspiracy Count:

The Government attempted to show that the appellant was part of a conspiracy with Moskowitz and D'Agostino by introducing evidence of a sale by Moskowitz to Agent Sennett in September of 1976, and again in February of 1977. The narcotics obtained at both of these sales were introduced into evidence over trial counsel's objection. It is respectfully submitted that the introduction into evidence of these proceeds of the above two sales by Moskowitz and D'Agostino, in which the appellant in no way participated, was reversible error.

This Court held in United States v. Falley, 489 F.2d 33 (2d Cir., 1973), as follows:

"Defense counsel protested vehemently throughout this presentation. Again and again he argued that the suitcase had no bearing on the case being presented against his clients. The prosecution responded that the relevance of the evidence would be established. Unfortunately, the prosecution's prediction never came true. In admitting the suitcase, the trial court decided that it was brought into court for one reason only--to buttress the credibility of accomplice Gibbons. According to the trial court, the prosecution wanted to show that Gibbons' testimony was not entirely a figment of his imagination; it wanted to prove, in the most concrete way possible, that Gibbons was indeed a smuggler of hashish." Id. at p. 37.

Noteably, in Falley, supra, the Court further stated:

"The government was certain that there was a smuggling conspiracy but it apparently felt that it had to show some hashish to the jury in order to make the conspiracy more believable and concrete. It had not been able to produce any hashish actually imported by the Falleys so, in effect, it went out and borrowed some for the simple purpose of exhibition. The fact that the drugs produced at the trial could be peripherally related to the proceedings is more of an ex post facto rationalization of the prosecution's behavior than an accurate description of its motivation." Id. at p. 37.

In United States v. Frattini, 501 F.2d 1234 (2d Cir., 1974), this Court reversed a conviction based upon inadmissible hearsay being introduced into evidence over objection.

A leading case in discussing hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator is United States v. Cirillo, 499 F.2d 872 (2d Cir., 1974). In a situation almost on all fours with the case at bar, this Court, in discussing the conviction of one Gaber, held as follows:

"The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that

he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence. Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test. See United States v. Fantuzzi, supra; United States v. Cimino, supra, and other decisions cited on page 883." Id. at p. 886.

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It is clear that the Government has failed to prove by the use of non-hearsay testimony that the appellant herein was a member of any conspiracy. The testimony by the agents at the trial and the admission into evidence of the contraband purchased in the September 1976 and February 1977 sales (to which the appellant was not a part) was clearly plain error. United States v. Vaught, 485 F.2d 320 (4th Cir., 1973).

The Government also tried to show that the appellant was in the vicinity of the apartment complex where the February 1977 arrest was made of D'Agostino. There was no testimony that the appellant has even entered into the apartment where the drugs were allegedly being sold from. In United States v. Tyler, 505 F.2d 1329 (5th Cir., 1975), the Court held the following:

"The element of intent must usually

be proved by circumstantial evidence. Nevertheless, intent must be shown, and a conviction upon the basis of association alone may not stand. United States v. Martinez, 5 Cir., 1973, 486 F.2d 15; Panci v. United States, 5 Cir., 1958, 256 F2d 308. Here, the only independent proof of concerted action was testimony as to Armand's visits to Tyler's apartment in the hour immediately preceding their arrest. There was no evidence as to what transpired inside Tyler's apartment. Further, there was no showing that Tyler and Armand had engaged in prior transactions or that Tyler had in any way been involved in illicit drug traffic. In fact, government agents testified that in the two months they had been contacting and surveilling Armand they had never seen Tyler or been led to his apartment." Id. at p. 1332.

In United States v. Torres, 503 F.2d 1120 (2d Cir., 1974), this Court held:

"Of course, mere presence at a site where a narcotics sale is planned but not consummated is insufficient to support a conspiracy conviction where there is no evidence that the purpose of the meeting is known to the alleged conspirator." Id. at p. 1124.

Interestingly enough in the Torres case, supra this Court found the following:

"That the defendant participated in the attempted sale of narcotics until the sale was aborted, and was present when an undercover officer spoke with another about dealing with that person in the future, and was present and heard the other officer negotiate for a fair purchase of drugs." Id. at p. 1124.

In the case at bar, the appellant, Mogavero, did not satis-

fy any of these criteria.

It is respectfully submitted that the Government failed to prove the appellant's guilt of conspiracy beyond a reasonable doubt.

POINT II

ALL OF THE EVIDENCE IN THE CASE AT BAR POINT TO THE INNOCENCE OF THE APPELLANT

The appellant took the stand in his own behalf at the trial and categorically denied any sale of pills or of even being present on November 4, 1976 at the Carvel parking lot.

The appellant was married, a father of three children and was gainfully employed for the last ten years at the same job. He was never convicted of any crime.

Proof was adduced that at least up until 4:30 p.m. on November 4, 1976, the appellant was working on his job at Rahway, New Jersey. The appellant testified that he did not have a beard on February 2, 1977 and this testimony was buttressed by a disinterested witness, his barber, Guy Ferro and one John Ranzino, who observed the appellant's lack of beard while hunting with him between October 15 and October 31, 1977. Furthermore, the Sentence Minutes reveal that the appellant had offered to take any scientific test to reveal that he did not take his car on November

4, 1976 to the Carvel parking lot. The appellant's supervisor, James McPadden, also testified that numerous other employees used the appellant's car.

It is respectfully submitted that in light of the scanty record of guilt presented on the Government's case, that the testimony of the appellant and the witnesses he called on his behalf should be given great weight.

It is respectfully submitted that the reasoning of the 5th Circuit in United States v. Suarez, supra, as to the appellant Chiong should be followed in the case at bar. The Court there ~~held~~:

"It is to be recognized, also, that the jury rejection of Chiong's testimony did not relieve the government of its obligation to present evidence sufficient to support the allegations of the indictment beyond a reasonable doubt, especially since Chiong gave no testimony from which the jury could affirmatively find guilt.

This case is reminiscent of Causey v. United States, 5 Cir., 1965, 352 F.2d 203. Causey was a conspiracy case. Chiong's case is not. In Causey we said that 'A suspicion however strong, is not proof and will not serve in lieu of proof * * * Guilt of conspiracy may not be inferred from mere association * * * The Prosecution certainly proved by association with the known guilty parties Burl Causey had an opportunity to become a conspirator * * * It did not prove that the crime followed the opportunity". Id. at p. 239.

The question of identification (though clearly a jury question in the case at bar) should also be considered in the light of United States v. Murray, 527 F.2d 401 (5th Cir., 1976), where the Court held as follows:

"Questions of identification are, of course, ordinarily for the determination of the jury. If, however, as in this case, the sole witness is unsure and there are no other connecting or corroborating facts or circumstances the jury is left without evidence upon which to translate unrelieved uncertainty into belief from the evidence beyond a reasonable doubt." Id. at p. 410.

CONCLUSION

The Judgment of Conviction should be reversed and the Indictment dismissed or, in the alternative, a new trial granted for the plain error committed at the trial.

RESPECTFULLY SUBMITTED,

FRANK T. GEOLY, ESQ.
(Harvey L. Greenberg, Esq.
on Memorandum of Law)

SPRING

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of Nov. 1977 at No. 225 Eadman Plaza East, Brooklyn, NY

deponent served the within *Brief*
upon U.S. Atty. East. Dist. of NY

the Appellee herein, by delivering *3* true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
16 day of Nov. 1977.

[Signature]
Edward Bailey

[Signature]
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978